

These are the tentative rulings for civil law and motion matters set for Tuesday, July 28, 2015, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, July 27, 2015. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances are governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY **JUDGE MICHAEL W. JONES** AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0053437 Western States Glass Corp. vs. Daleuski, John David

Plaintiff and judgment creditor Western States Glass Corporation of Northern California's Motion for (1) Order Authorizing any Sheriff/Levying Officer to Levy in Debtor's Private Places; and (2) for Award of Post-Judgment Attorney's Fees and Reimbursement of Extraordinary Costs and Expenses Incurred is denied in part and granted in part, as set forth below.

Plaintiff's request for an order authorizing the sheriff or levying officer to enter private places belonging to defendant to both serve process and seize cash on hand is denied. Plaintiff provides no statutory authority for the request. While Code of Civil Procedure section 699.030(b) permits a judgment creditor to apply to the court for an order directing the levying officer to seize personal property in a private place, plaintiff fails to describe with particularity both the property sought to be levied upon, and the place where it is to be found. Code Civ. Proc. § 699.030(b).

Plaintiff's request for post-judgment attorneys' fees is granted. Code Civ. Proc. § 685.040. Plaintiff is awarded post-judgment attorneys' fees from defendant and judgment debtor John David Daleuski, dba Daleuski's Custom Glass, in the amount of \$2575. Plaintiff's request for "extraordinary costs and expenses" is denied, as plaintiff fails to set forth the statutory authority for the request.

2. M-CV-0062485 Capital One Bank USA, N.A. vs. Marton, Janell D.

Appearance required. Plaintiff is advised that its notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

Plaintiff's Motion to Compel Further Responses to Discovery is granted.

In responding to interrogatories, the responding party must provide answers which are "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code Civ. Proc. § 2030.220(a), (b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." Code Civ. Proc. § 2030.220(c).

A response to a demand for inspection must include an agreement to comply, the representation of inability to comply, or objections to all or part of the demand. Code Civ. Proc. § 2031.210(a). If only part of the category demanded is objectionable, the response must contain an agreement to comply with the remainder, or representation of inability to comply. Code Civ. Proc. § 2031.240(a).

A response to a request for admission must contain an admission, denial or statement claiming inability to admit or deny. Code Civ. Proc. § 2033.220(b). Each answer "shall be as complete and straightforward as the information reasonably available to the responding party permits." Code Civ. Proc. § 2033.220(a). A party claiming the inability to admit or deny must also state that a reasonable inquiry was made to obtain sufficient information. Code Civ. Proc. § 2033.220(c).

In responding to plaintiff's Special Interrogatories, Set One, Request for Production of Documents, Set One, and Request for Admissions, Set One, defendant has asserted only unmeritorious objections based primarily on the contention that plaintiff has not yet provided sufficient proof to defendant to substantiate the claims made in this lawsuit. Such an objection is not an appropriate basis to refuse to answer duly served discovery. Defendant's responses fail to comport with the requirements of the Code of Civil Procedure as set forth above, and defendant fails to justify her objections and refusal to respond.

Defendant shall serve further verified responses to the subject discovery, without objections, by no later than August 14, 2015.

3. M-CV-0063469 Buisson, Linda vs. Deloach, Heather, et al

Defendants' Demurrer to Complaint is sustained without leave to amend.

Plaintiff has filed this unlawful detainer action based on a judgment in her favor in a related quiet title action relating to the property. Plaintiff alleges that judgment was entered in

her favor on February 4, 2015. Plaintiff alleges service of a 3-day notice to pay rent or quit on April 27, 2015, by which she demanded payment of rent from April 28, 2014, to April 27, 2015, in the total amount of \$21,900, based on an independent appraisal which estimated the rental value of the property at \$1,825 per month. The court notes that the letter attached to the complaint states that the home is “currently not in a condition that our company would rent”, but that if repairs are made to restore the property, it would rent for approximately \$1,795-\$1,859 monthly.

Plaintiff fails to allege the existence of a rental agreement or other contractual relationship by which defendants agreed to pay rent in the amount of \$60 per day or \$1,825 per month for rental of the subject premises. Plaintiff alleges an “implied-in-fact” rental agreement manifested by the conduct of the parties, but the court is not required to accept such conclusory allegations as true for the purpose of ruling on a demurrer. The factual allegations that have been added to the first amended complaint still do not come close to alleging an implied-in-fact agreement between the parties. Plaintiff alleges termination of the tenancy based on non-compliance with the 3-day notice demanding payment of \$21,900. Given that the instant unlawful detainer action is based on a termination of tenancy after non-payment of rent, the failure to adequately allege an agreement between the parties for payment of rent is fatal to the cause of action for unlawful detainer.

Plaintiff was previously given leave to amend, but still fails to articulate a valid cause of action for unlawful detainer. Accordingly, the demurrer is sustained without leave to amend.

4. S-CV-0030637 Agutos, Florencio, et al vs. Centex Homes

Cross-defendants XL Specialty Insurance Company and Greenwich Insurance Company’s Motion for Leave to File Cross-Complaint Pursuant to Code of Civil Procedure § 426.50 and § 428.50 is continued to August 18, 2015, at 8:30 a.m. in Department 40.

The proof of service in the court’s file does not establish that the motion was served on all parties who have appeared in this action, as it fails to identify the name and service address of each person served. Cal. R. Ct., 2.251(i)(1). At least five court days prior to the continued hearing date, moving parties shall file an amended proof of service which identifies the parties served with the motion.

5. S-CV-0030841 Austin, William, et al vs. Morrison Homes, Inc., et al

The Motion to Compel Further Responses to Special Interrogatories, Set One, was continued by stipulation of the parties to September 8, 2015, at 8:30 a.m. in Department 40.

6. S-CV-0032637 Boyett Const., Inc. vs. Allianz Global Risks U.S. Insurance

The Motion for Summary Judgment was continued by stipulation of the parties to August 11, 2015, at 8:30 a.m. in Department 40.

7. S-CV-0033861 Gordon, Kenneth, et al vs. Dougherty, Glenn

Cross-defendant Summit Builders, Inc. dba Performance Drywall's Motion for Good Faith Settlement is denied without prejudice.

The proof of service filed in connection with the motion fails to establish valid service on all parties who have appeared in the action. Based on the court's records, it appears that the motion was not duly served on defendants/cross-defendants Yukon Masonry, Cavolt & Sons Glass & Window, and DLM Development, Inc.

8. S-CV-0034049 Northern Cal. Collection Service vs. Mercury Solar Systems

Plaintiff's Motion to Enforce Settlement Agreement is denied.

Code of Civil Procedure section 664.6 empowers the court to enter judgment pursuant to a written settlement agreement between parties, or oral settlement made before the court. In this case, the parties participated in a mandatory settlement conference May 8, 2015, and reached a settlement agreement as reflected in written stipulation filed with the court. The stipulation provides in relevant part that defendant Mercury Solar Power ("Mercury") is to pay Solar Power Inc. the sum of \$30,000, payable within two weeks from the date of receipt of the signed settlement agreement prepared by attorney for Mercury Solar Power.

Plaintiff argues that the attorney for Mercury failed to prepare a settlement agreement with terms acceptable to plaintiff. Plaintiff asks the court to sign an order it has prepared which purportedly sets forth the settlement terms. Mercury counters that it has prepared a settlement agreement which has been agreed to by Solar Power Inc., and asks the court to order plaintiff to sign the agreement. The parties dispute the meaning and intent of the portion of the stipulation requiring a written settlement agreement to be prepared by counsel for Mercury.

Code of Civil Procedure section 664.6 permits the court to enter judgment "pursuant to the terms of the settlement". The proposed order requested by plaintiff is not clearly reflective of the terms of the settlement reached at the May 8, 2015, mandatory settlement conference, as it appears to change and add various terms and conditions beyond that which was agreed to in writing pursuant to the parties' stipulation. Accordingly, the motion cannot be granted. Mercury's request that plaintiff be ordered to sign its proposed settlement agreement is not properly before the court, and is also denied.

9. S-CV-0034376 United Auburn Indian Comm. vs. Penta Building Group, et al

Liberty Mutual Insurance Company's Motion for Leave to Intervene is denied without prejudice.

Although sufficient grounds exist to grant the motion, the proposed pleading to be filed by the moving party is not in order. Code of Civil Procedure section 387(a) specifically requires that intervention be made "by complaint, setting forth the grounds upon which the intervention

rests”. The answer submitted by Liberty Mutual Insurance Company does not comply with Code of Civil Procedure section 387(a).

10. S-CV-0034441 Roberts, Kenneth, et al vs. JPMorgan Chase Bank, et al

The Demurrer to First Amended Complaint is continued to August 4, 2015, at 8:30 a.m. in Department 40.

11. S-CV-0035041 Smith, Gregory, et al vs. California State Board Equalization

The Motion to Dismiss is continued to August 18, 2015, at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

12. S-CV-0035135 Cypress Insurance Co. vs. Gyori Development Corp.

Defendant’s Motion to Set Aside Default and Default Judgment is denied.

Defendant moves to set aside default and default judgment pursuant to Code of Civil Procedure section 473(b) and 473.5, on the grounds that it did not receive actual notice of the lawsuit. Defendant admits that the summons and complaint were duly served on defendant’s agent for service of process on November 17, 2014. However, defendant asserts that the agent for service of process did not forward the summons and complaint to defendant’s president, and did not otherwise inform him of the litigation. Defendant’s president, Jeremy Gyori, submits a declaration stating only, “GDS was not notified by Hullen Ross of the instant lawsuit until after the default, default judgment and levy described below had occurred.” (Gyori decl., ¶ 4.)

Competent evidence is required to justify relief under Code of Civil Procedure section 473.5. *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318. Defendant must demonstrate that the lack of actual notice “was not caused by his or her avoidance of service or inexcusable neglect.” *Id.* at 1319. In this case, the only evidence submitted in support of the motion is the declaration of Jeremy Gyori. Tellingly, there is no declaration from the agent, Michael Hullen, and there is no other information explaining why Mr. Hullen supposedly did not inform Mr. Gyori of the lawsuit. As defendant fails to provide sufficient evidence to support the conclusion that he did not receive actual notice of the action in time to defend, the motion is denied.

13. S-CV-0035685 Madu, Frank U. vs. U.S. Auto Sales, et al

The Motion to Compel is continued to August 11, 2015, at 8:30 a.m. in Department 40.

14. S-CV-0035777 Cusick, Kent, et al vs. Ocwen Loan Servicing, LLC

The Demurrer to First Amended Complaint is continued to August 4, 2015, at 8:30 a.m. in Department 40.

15. S-CV-0035817 Bayless, Dian vs. Daisy Holdings, LLC, et al

Rulings on Objections

Plaintiff's objections to the Declaration of Philippa Grumbley are ruled on as follows: Objection Nos. 1 and 2 are overruled. Objection Nos. 3-5 are sustained.

Ruling on Petition

Defendant's Petition to Compel Arbitration is granted.

Code of Civil Procedure section 1281.2 provides that if an agreement to arbitrate a controversy exists, the court must order the parties to arbitrate unless it determines that there has been a waiver of the right to compel arbitration by the petitioner, or grounds exist for revocation of the agreement. Plaintiff objects to arbitration on the grounds that the agreement is unconscionable, and therefore unenforceable. Unconscionability "has both a procedural and a substantive element." *A&A Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486. Both elements are weighed on a sliding scale so that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz v. Foundation Health Psychcare Svcs., Inc.* (2000) 24 Cal.4th 83, 114.

Procedural unconscionability concerns the manner in which the contract was negotiated, and the parties' circumstances at that time, focusing on factors of oppression or surprise. *Kinney v. United HealthCare Svcs., Inc.* (1999) 70 Cal.App.4th 1322, 1329. "The oppression component arises from an inequality of bargaining power ... and an absence of real negotiation or a meaningful choice on the part of the weaker party." *Id.* Procedural unconscionability may be found where the weaker party is presented the clause on a "take it or leave it" basis. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100. The surprise component involves the extent to which the arbitration terms are hidden or disguised from the weaker party. *Armendariz v. Foundation Health Psychcare Svcs., Inc.*, *supra*, 24 Cal.4th at 114.

The arbitration agreements in this case were not presented on a "take it or leave it" basis. Execution of the agreements was not a condition of admission to defendant Pine Creek Care Center ("Pine Creek"), which was expressly stated on the agreements. The arbitration terms were not hidden or disguised. The arbitration agreements were separate documents which were clearly labeled. The word "optional" appears in the heading of both documents, in large, bold and underlined font. Plaintiff's inability to negotiate terms of the agreements is irrelevant, as plaintiff was not required to sign the agreements as a condition of admission. The agreements even provided that they could be rescinded within 30 days by written notice.

Plaintiff argues that the documents were not clearly explained to her, and that she lacked capacity to agree to arbitration at the time she signed the agreements. Plaintiff's assertion that she was somehow misled by defendant's representative at the time she signed the agreements lacks credibility. The agreements themselves are two-page documents which begin with a statement in all caps that residents are not required to sign the document as a condition of

admission. Directly below that statement, the word “optional” is in bold and underlined. Plaintiff signed the second page of the agreements directly below a statement certifying that she had read them and been given a copy.

Plaintiff submits a declaration stating that on September 5, 2014, she was diagnosed with cervical transverse myelitis with paraplegia, and was on “super-antibiotics, norco and prednisone.” (Bayless decl., ¶ 2.) She asserts that at that time she was in extreme pain, suffering from depression, and that the afore-mentioned drugs made her feel very tired, and caused her “trouble thinking clearly.” (Id., ¶ 3.) Two weeks later, plaintiff was transferred to Pine Creek. (Id., ¶ 4.) Plaintiff asserts that at the time she was transferred, she was “physically and emotionally exhausted and extremely apprehensive and agitated due to the fact that family members had not had good experiences with skilled nursing facilities.” (Id.) After she signed the documents, she continued to be under medication due to her medical condition and pain. (Id., ¶ 11.)

The evidence submitted by plaintiff is insufficient to support the conclusion that she lacked capacity to enter into a contract at the time she signed the arbitration agreements. It is not clear what medications plaintiff was taking as of February 18, 2014, nor how such medications may have affected her ability to understand and appreciate the documents she was signing. At most plaintiff generally describes tiredness and “trouble thinking clearly” when she presented at Sutter Healthcare, and anxiety and physical and emotional fatigue when she transferred to Pine Creek. Such evidence is insufficient to establish a lack of capacity on February 18, 2014.

Substantive unconscionability focuses on whether the terms of the agreement are overly harsh or one-sided. *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133, 1142-1145. Plaintiff argues that substantive unconscionability may be found where arbitration is imposed only on claims the weaker party is likely to bring. Plaintiff cites only to case law relating to disputes between employees and employers in support of this argument, and does not explain what types of claims a health care facility might bring against a patient, other than those relating to disputes regarding payment for services. Plaintiff does not establish that the arbitration agreements in this case are unfairly one-sided or lacks mutuality.

Both elements of procedural and substantive unconscionability must be present in order for the court to refuse to enforce the arbitration agreements. *Armendariz v. Foundation Health Psychcare Svcs., Inc.*, *supra*, 24 Cal.4th at 114. In this case, plaintiff fails to establish that either element is present.

Plaintiff also opposes the motion on the grounds that defendant has waived the right to arbitrate, and due to the possibility of conflicting rulings. Undue delay in invoking arbitration can waive a party’s right to compel arbitration. *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 951. A waiver should be found where a party is “substantially deprived of the advantages of arbitration.” *Id.* at 948. A party seeking to establish a waiver must show actual prejudice has resulted from the delay in seeking arbitration. *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211-212. This action was filed in February 2015. The petition to compel arbitration was filed on June 19, 2015, following defendants’ attempts to obtain plaintiff’s agreement to arbitrate without the necessity of filing a petition. Plaintiff fails to demonstrate

undue delay, or prejudice as a result of the delay. Further, plaintiff offers no information as to how the arbitration will create the possibility of conflicting rulings.

Based on the foregoing, defendants' petition to compel arbitration is granted. This action shall be stayed pending arbitration of plaintiff's claims, which arbitration shall not include plaintiff's second cause of action for violation of the Patient's Bill of Rights.

An OSC re Status of Arbitration is set for March 29, 2016, at 11:30 a.m. in Department 40.

16. S-CV-0035993 Ghaffari, Homeyra, et al vs. Bayview Loan Servicing, LLC, et

The Motion for Judgment on the Pleadings is continued to August 4, 2015, at 8:30 a.m. in Department 40.

17. S-CV-0036021 Woo, Frank, et al vs. John Mourier Construction, Inc.

The Motion to Stay is dropped as moot. A stipulation to stay the action has been filed.

18. S-CV-0036193 Jaysel Hitchcock Revocable Trust vs. Diamond K Estates

Defendants' Demurrer to Plaintiffs' Complaint is sustained without leave to amend.

A party may demur to the complaint where the pleading does not state facts sufficient to constitute a cause of action. CCP § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. All properly pled facts are assumed to be true, as well as those that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. While the trial court must accept as true all material facts properly pleaded, it does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts that are judicially noticed." *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1219–1220.

Plaintiffs' complaint purports to allege twenty causes of action including disability discrimination, wrongful eviction, harassment, and related claims. As a whole, the complaint is fatally ambiguous and unintelligible. Code Civ. Proc. § 430.10(f). The complaint makes certain allegations relating to a parking dispute, but does not identify four of the five named defendants in any way, and does not make clear which causes of action are directed to which defendants. Accordingly, defendants cannot reasonably respond to the allegations of the complaint, as they cannot determine what claims are directed against them. *See Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616.

Further, each cause of action fails as plaintiffs fail to allege facts sufficient to state any of the causes of action in the complaint. Plaintiffs' discrimination-based causes of action fail to allege discrimination on the basis of disability. The complaint merely alleges that plaintiffs' request to park their vehicles in certain places near their home was denied for unknown reasons.

The complaint also alleges that unspecified alternative accommodations offered by defendants resulted in physical injury to plaintiff Jandy. Such allegations are insufficient to adequately allege unlawful discrimination on the basis of disability. Remaining causes of action relating to alleged harassment and wrongful eviction lack any factual allegations in support.

The court deems plaintiffs' failure to oppose the demurrer as an abandonment of their claims against moving defendants, and sustains the demurrer without leave to amend. *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20.

19. S-CV-0036199 Salondaka, James vs. Rice, Mario

Defendant's Motion to Strike Portions of Plaintiff's Complaint is denied.

Defendant has moved to strike allegations of plaintiff's complaint which assert entitlement to prejudgment interest in accordance with Civil Code section 3291. The basis for defendant's motion is that the damages sought in this personal injury action are not certain, or readily capable of being made certain by calculation, as required by Civil Code section 3287. As noted by plaintiff, the requirements of Civil Code section 3287 are not relevant to the question of whether plaintiff is entitled to prejudgment interest under section 3291.

In reply, defendant makes the entirely separate argument that plaintiff has not alleged sufficient facts to show that he is, or will be, entitled to prejudgment interest pursuant to section 3291, because he does not allege that a 998 offer has been made and rejected by defendant prior to judgment. The court has discretion not to consider new arguments made only in the reply as opposing party has not been afforded an opportunity to respond. *Alliant Ins. Svcs., Inc. v. Gaddy* (2009) 159 Cal.App.4th 1292, 1307-1308. But even if the court did consider the arguments set forth in the reply, the motion would still be denied, as defendant does not establish that the allegations are irrelevant, false or improper. Code Civ. Proc. § 436.

20. S-CV-0036315 Auburn Woods I Homeowners Ass'n vs. State Farm Insurance

Defendant's Demurrer to the Third Cause of Action of the Complaint is overruled in part, and sustained in part with leave to amend.

A party may demur to the complaint where the pleading does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787. Plaintiff's allegations are accepted as true for the purpose of ruling on the demurrer. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

With respect to plaintiff Auburn Woods I Homeowners Association ("Auburn Woods"), the complaint, read as a whole, alleges sufficient facts to state a valid cause of action under Business and Professions Code sections 17200 *et seq.* The complaint alleges facts supporting the assertion that defendants engaged in unfair competition, including unlawful, unfair or fraudulent business acts. See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.

The complaint also prays for equitable remedies which are available in an action under the Unfair Competition Law. Defendants do not show that Auburn Woods' claim for restitution of premiums constitutes a money damages claim that may be adequately remedied by other legal means. The demurrer is overruled with respect to Auburn Woods' third cause of action.

However, as to plaintiff Al Frei, individually and doing business as Frei Real Estate Services ("Frei"), the allegations of the complaint admit that Frei paid no premiums to defendants. (Complaint, ¶ 33.) Frei cannot recover restitution if he does not allege an ownership interest in the amounts paid to defendants for the premiums. *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at 1148-1149. Accordingly, the demurrer is sustained with leave to amend with respect to Frei's third cause of action.

Any amended complaint shall be filed and served on or before August 14, 2015.

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